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Supreme Court, U. S.

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CHARLES ELMORE GROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 22

UNITED STATES OF AMERICA,

Petitioner,

vs.

CONTINENTAL NATIONAL BANK AND TRUST
COMPANY, A CORPORATION, TRUSTEE UNDER THE LAST
WILL AND TESTAMENT OF JAMES DUGGAN, DECEASED, ET AL.

*On Writ of Certiorari to the Circuit Court of Appeals
for the Seventh Circuit.*

**MOTION TO DISMISS WRIT OF CERTIORARI AND BRIEF
IN SUPPORT THEREOF.**

CONTINENTAL NATIONAL BANK AND TRUST
COMPANY OF CHICAGO,
By EDWARD H. McDERMOTT,
Its Attorney-in-Fact.



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MOTION TO DISMISS WRIT OF CERTIORARI.

Comes now Continental National Bank and Trust Company of Chicago, a national banking association with its principal office in Chicago, Illinois, appearing specially and not generally and solely for the purpose of this motion, and moves that an order be entered by the court dismissing said writ of certiorari as to Continental National Bank and Trust Company of Chicago, as Trustee under Item 6 of the last will and testament of James Duggan, deceased, and in support of said motion shows to the court the following:

1. Before this court granted a review on the writ of

certiorari in this cause said Continental National Bank and Trust Company of Chicago ceased by operation of law to be Trustee under Item 6 of the last will and testament of James Duggan, deceased, and the corpus of the trust created by said Item 6 passed to and was paid, transferred and delivered over to Continental Illinois National Bank and Trust Company of Chicago, a separate national banking association with its principal office at Chicago, Illinois, as Trustee under certain trusts designated by Henry Duggan, deceased.

2. Said Continental National Bank and Trust Company of Chicago is not now and has at no time since this court granted a review of this cause on writ of certiorari been Trustee under said Item 6 of the last will and testament of James Duggan, deceased, nor has it held any of said trust estate since the granting of said review.

~ CONTINENTAL NATIONAL BANK AND TRUST
COMPANY OF CHICAGO,

By EDWARD H. McDERMOTT,

Its Attorney-in-Fact.

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WILL AND TESTAMENT OF JAMES DUGGAN, DECEASED, ET AL.*On Writ of Certiorari to the Circuit Court of Appeals
for the Seventh Circuit.*STATE OF ILLINOIS, { ss.
COUNTY OF COOK.AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS
WRIT OF CERTIORARI.

B. E. BRONSTON, being first duly sworn, deposes and says:-

1. Affiant is now and at all times hereinafter mentioned was Assistant Secretary of Continental National Bank and Trust Company of Chicago, a national banking association.

2. Under Item 3 of the last will and testament of James Duggan, deceased, said corporation was appointed as Trustee of the sum of \$50,000 for the benefit of Timothy Duggan and certain other beneficiaries. Said corporation accepted said trust and has for several years last past been and still is acting as Trustee under said trust.

3. Under Item 6 of said will said corporation was appointed as Trustee of the "rest, residue and remainder" of the estate of said James Duggan, deceased, to pay income therefrom to Henry Duggan for life. Item 8 of said will provided with respect to said trust as follows:

"Upon the death of my said brother, Henry Duggan, the said trust shall cease and determine and the trust estate, then in the hands of the said Trustee shall be paid, transferred, and delivered over as may be designated and appointed in and by the last will and testament of my said brother, Henry Duggan."

Said corporation accepted said trust created by said Item 6 and continued to act as Trustee thereunder until October 16, 1937.

4. On October 16, 1937, said Henry Duggan died leaving a last will and testament and codicil, in which he appointed and provided that the trust estate then in the hands of said corporation as Trustee under said Item 6 should be paid, transferred and delivered over to Continental Illinois National Bank and Trust Company of Chicago, a national banking association, separate and distinct from said Continental National Bank and Trust Company of Chicago, as Trustee upon certain trusts designated by the said Henry Duggan.

5. In accordance with said Item 8 of said will of said James Duggan, deceased, the aforesaid trust created by said Item 6 ceased and determined on October 16, 1937, and the right and title to the corpus of said trust passed by operation of law to said Continental Illinois National Bank

and Trust Company of Chicago. The corpus of said trust created by said Item 8 was physically paid, transferred, and delivered over to said Continental Illinois National Bank and Trust Company of Chicago on April 6, 1938, and before the receipt of notice of the application by the petitioner to this court for a writ of certiorari.

6. On January 10, 1938, more than two weeks prior to the issuance of the mandate of the Circuit Court of Appeals for the Seventh Circuit in this cause, counsel for petitioner were informed by counsel who had represented said Henry Duggan in this proceeding that he had died on October 16, 1937.

7. On April 1, 1938, long after the issuance of said mandate, petitioner filed with the Clerk of the Circuit Court of Appeals for the Seventh Circuit in this cause a motion reciting that under Item 8 of said will of James Duggan, deceased, provision is made for the termination of the trust created by Item 6 thereof and for the distribution of the corpus of the trust in accordance with the will of said Henry Duggan, deceased. Said motion prayed that an order be entered prohibiting any distribution of the assets pending disposition of petition for certiorari to this court. Said motion was denied on April 5, 1938, and no error has been assigned nor review sought with respect to said denial.

8. On September 30, 1938, notice was sent to the Commissioner of Internal Revenue advising that the trust created by said Item 6 of said will of James Duggan, deceased, had ceased and determined in accordance with Item 8 of said will by reason of the death of Henry Duggan and that the trust estate had been paid, assigned, transferred and set over to Continental Illinois National Bank and Trust Company of Chicago.

9. The termination of said trust created by said Item 6 of said will of James Duggan, deceased, and the termination

of the trustee capacity of Continental National Bank and Trust Company of Chicago with respect thereto was suggested of record herein in the brief of respondent in opposition to the petition for a writ of certiorari but no action has been taken by the petitioner to dismiss from this proceeding said Continental National Bank and Trust Company of Chicago as Trustee under said Item 6 of said will of James Duggan, deceased.

B. E. BRONSTON.

SUBSCRIBED and SWORN to before me this 6th day of October, 1938.

WILLIAM P. BEST,
Notary Public.

My commission expires May 24, 1941.

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CONTINENTAL NATIONAL BANK AND TRUST COMPANY, A CORPORATION, TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF JAMES DUGGAN, DECEASED, ET. AL.

On Writ of Certiorari to the Circuit Court of Appeals for the Seventh Circuit.

BRIEF IN SUPPORT OF MOTION TO DISMISS WRIT OF CERTIORARI.

Upon the death of Henry Duggan on October 16, 1937, the trust created under item 6 of the last will and testament of James Duggan, deceased, ceased and determined (foregoing affidavit, paragraph 3).

As the Continental Illinois National Bank and Trust Company of Chicago, a national banking association separate and distinct from Continental National Bank and Trust Company of Chicago, was designated and appointed

by Henry Duggan to receive the trust *res* and hold the same upon certain trusts, the title to the trust *res* passed at once by operation of law from the old trustee to the new. *Trusts and Trustees*, Bogert, Volume 4, Section 1003, p. 2941; *Anderson v. Messinger*, 146 Fed. 929, 948 (C. C. A. 6).

On April 6, 1938, after the mandate of the Circuit Court of Appeals for the Seventh Circuit had issued in this cause affirming the judgment of the District Court and after the denial by the Circuit Court of Appeals of petitioner's motion to enjoin the Continental National Bank and Trust Company of Chicago from distributing the assets of the trust, the trust estate was physically paid, transferred and delivered over to Continental Illinois National Bank and Trust Company of Chicago as trustee upon certain trusts designated by Henry Duggan, deceased. The trustee capacity of the Continental National Bank and Trust Company of Chicago had therefore entirely ceased before this Court granted a review of this cause on writ of certiorari, and the trust *res* had passed beyond the control of the bank.

When the powers of a trustee cease and a new trustee receives the trust *res* any action pending at the time against the former trustee can no longer be prosecuted against the new trustee, and, in this case, the new beneficiaries. *Greenleaf v. Queen*, 1 Peters (U. S.) 138, 148; *Stout v. Betts*, 26 N. Y. S. 809; *Dumas, Trustee v. Robins*, 48 Ala. 545; *McDougald's Administrator v. Carey*, 38 Ala. 320; *Mannix v. Elder*, 1 Ohio Circuit Decisions 36. To hold otherwise would be to interfere with the operation of the trust and the substantial rights of third parties under it, while it is imposing no hardship to require those interested in the further prosecution of the action to substitute for the former trustee, the successor trustee and the new beneficiaries.

This is merely the general rule that, where one is a party to an action only in a representative capacity, termination of his capacity eliminates him from the action just as completely as though he had died. Further prosecution of the action against him in ~~that~~ capacity is futile and the proceeding should be dismissed as to him. *Taylor, et al. v. Savage*, 1 Howard 282, 285; *Hulburd v. Commissioner*, 296 U. S. 300, 314; *Adams v. Leland*, 7 Pick. (Mass.) 62; *People v. Harrigan*, 291 Ill. 206, 208, 125 N. E. 903; *New York & W. U. Teleg. Co. v. Jewett*, 115 N. Y. 166, 21 N. E. 1036; *Brown v. Melton* (Tex.), 13 S. W. 473.

In *Taylor, et al. v. Savage*, 1 Howard 282, 285, this court stated with reference to a former executor (p. 285):

“* * * Before the appeal was prayed on either side, he had ceased to be the representative of the estate of Samuel Savage, and had no control over it, nor any right to interfere with it by prosecuting or appearing to an appeal, or in any other manner. By his removal from the office of executor, he was as completely separated from the business of the estate as if he had been dead, and had no right to appear in or be a party in this or any other court, to a suit which the law confided to the representative of the deceased. No further proceedings, therefore, could be had on the decree in the District Court, until Benham, the administrator *de bonis non*, was made a party.”

In the brief of petitioner on writ of certiorari herein reference is made to Section 3467 of the Revised Statutes, amended by Section 518 of the Revenue Act of 1934, C. 277, 48 Stat. 680,760, and the statement is made that “the trust company could not avoid liability for the amount of the Government’s claim, or defeat its right to maintain this action, even if it could prevail upon the proper state court to permit distribution of the trust corpus.” Petitioner’s brief then cites several cases involving the personal liability of a bankruptcy trustee or trustee for creditors who have paid debts due general creditors before satisfying the tax

debt due to the Government. While it is submitted that Section 3467 of the Revised Statutes has no application to the facts surrounding the termination of this trust and the passing of the trust *res* by operation of law, that is nevertheless a problem not now confronting the court. The death of Henry Duggan terminated the trust and caused the transfer from one trustee to the other trustee and it was not necessary to obtain any order of distribution from a state court.

Continental National Bank and Trust Company of Chicago has been made a party to this proceeding in only two capacities, *i. e.* (1) as trustee of a fund of \$50,000 under item 3 of the last will of James Duggan, deceased, and (2) as trustees of the residuary estate of James Duggan, deceased, under item 6 of his will. This latter trust has terminated, the trustee capacity of Continental National Bank and Trust Company of Chicago with respect thereto has ceased, and this writ of certiorari should therefore be dismissed as to the Continental National Bank and Trust Company of Chicago, as trustee under item 6 of the last will and testament of James Duggan, deceased,

Respectfully submitted,

EDWARD H. McDERMOTT,

*Attorney in fact for Continental
National Bank and Trust Com-
pany of Chicago.*

